

Decision 02-12-061 December 19, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application Pursuant to Public Utilities Code Section 854 for Approval of the Indirect Transfer of Control of XO California, Inc. (U 5553 C) and XO Long Distance Services, Inc. (U 6272 C) from XO Communications, Inc., Debtor-in-Possession, to a Reorganized XO Communications, Inc. controlled by High River Limited Partnership.

Application 02-10-036
(Filed October 28, 2002)

**OPINION GRANTING APPLICATION TO
INDIRECTLY TRANSFER OWNERSHIP AND CONTROL**

I. Summary

We authorize Applicants XO California, Inc. (XO California) and XO Long Distance Services, Inc. (XO Long Distance) (Jointly Applicants) to indirectly transfer ownership and control through their parent company, XO Communications, Inc., Debtor-in-Possession (XO), from Craig O. McCaw to a newly reorganized XO Communications, Inc. (Reorganized XO), a majority of whose stock will be owned by High River Limited Partnership (High River), which is ultimately controlled by Carl C. Icahn.¹ We also grant Applicants' motion for a protective order.

¹ High River will receive the majority and controlling interest in Reorganized XO. High River and Meadow Walk Limited Partnership, a note holder entitled to approximately 1.4% equity interest in Reorganized XO and also controlled by Icahn, may distribute the acquired stock of Reorganized XO so that Cardiff Holding LLC will hold it.

II. Categorization

Applicants have requested that this matter be categorized as ratesetting and that no hearings are necessary. By Resolution ALJ 176-3099, dated November 7, 2002, the Commission preliminary determined that this was a ratesetting proceeding, and that no hearings were expected.

Notice of this application appeared in the Commission's November 5, 2002, Daily Calendar. With no filed protests, there is no reason to hold a public hearing and no reason to change the preliminary determinations made in Resolution ALJ 176-3099.

III. Jurisdiction

The application has been filed pursuant to Pub. Util. Code § 854 and Rules 35 and 36 of the Commission's Rules of Practice and Procedure. Section 854 precludes any person or corporation from transferring control of any public utility organized and doing business in this state without first securing authorization to do so from this Commission upon a finding that the transfer of control is in the public interest. The purpose of this and related sections is to enable the Commission, before any transfer of public utility property is consummated, to review the situation and to take such action as the public interest may require. (*San Jose Water Co.* (1916) 10 CRC 56.)

IV. The Parties

XO California is a Washington corporation and a wholly owned subsidiary of XO, a Delaware corporation. XO California (formerly NEXTLINK Communications) was granted a Certificate of Public Convenience and Necessity (CPCN) to provide facilities-based and resold competitive local exchange service in D.95-12-057 and D.96-02-072, respectively. D.95-12-057 assigned XO

California, a nondominant telecommunications carrier, its U-5553-C corporate identification number.

XO Long Distance (formerly NEXTLINK Long Distance Services, Inc.) is a Washington corporation and a wholly owned subsidiary of XO. In D.99-11-061, the Commission granted XO Long Distance authority to operate as a switchless reseller of inter-Local Access and Transport Area (LATA) service. That decision assigned XO Long Distance, a nondominant telecommunications carrier, its U-6272-C corporate identification number. In D.00-07-059, the Commission granted XO Long Distance authority to operate as a facilities-based carrier of interLATA and, to the extent authorized by D.94-09-065, intraLATA telecommunications services offered by communication common carriers in California subject to the conditions set forth in that decision.

High River, the major stockholder of Reorganized XO, is not a party to this application. High River is a Delaware limited partnership ultimately controlled by Icahn, who has a majority ownership interest in High River through his ultimate control and ownership of its general and limited partners. The general partner of High River is Barberry Corp., a Delaware corporation that holds an approximate 1% partnership interest in High River. Icahn owns 100% of Barberry's stock. High River has two limited partners, Chelonian Corp., a New York corporation, and Highcrest Investors Corp., a Delaware corporation, that hold an approximate 91% and 8% partnership interest in High River. Icahn controls almost all of the stock of each limited partner.

V. The Transaction

XO filed a petition pursuant to Chapter 11 of the U.S. Bankruptcy Code with the U.S. Bankruptcy Court for the Southern District of New York on June 17, 2002. Pursuant to a Stand-Alone Plan before the Bankruptcy Court, the

outstanding shares of XO would be cancelled and \$500 million of the \$1 billion in existing loans under XO's secured credit facility would be converted into 95% of the new initial common stock of Reorganized XO, issued pro rata to the holders of the senior secured loans outstanding of XO.² XO note holders and general unsecured creditors collectively would receive the remaining 5% of this initial common equity. At the same time, the remaining \$500 million in secured debt will be converted into a \$500 million pay-in-kind junior secured loan. As a result of High River's holdings in XO debt, High River would be issued no less than 80% of the new initial common stock of Reorganized XO. No shareholder other than High River is expected to hold 10% or more of the initial reorganization common stock.

Reorganized XO may seek to obtain funds through a rights offering to certain of XO's other creditors; if all shares were issued, High River's interest in Reorganized XO would not be diluted below 50%. The Stand-Alone Plan also provides for the grant of stock options to Reorganized XO management and three series of warrants to XO note holders and general unsecured creditors for the purchase of additional common stock at a premium.

Where acquiring companies do not possess CPCNs, we apply the same requirements as an applicant seeking a CPCN to exercise the type of authority held by the company being acquired, a minimum of \$100,000 in cash or cash equivalent, and technical expertise in telecommunications or a related business.

² In D.02-08-059, we approved Applicant's earlier application, A.02-05-018, to indirectly transfer control to Forstmann Little & Co. partnerships and a subsidiary of Telefonos de Mexico, S.A. de C.V. XO will not implement that transaction, and that Purchase Agreement will be terminated.

Applicants provided an October 30, 2002 letter from Fleet Commercial Banking, which confirms that High River's account balance exceeds \$100,000. High River has sufficient resources to meet our requirements. High River does not possess telecommunications expertise. However, High River does not plan to exercise its control of XO to change existing management. XO's existing management has technical expertise as evidenced by their experience with XO and other telecommunications firms.³ High River's reliance on XO's management's technical expertise will satisfy our technical expertise requirement and approval of the proposed transaction will be conditioned on maintaining the majority of current senior management or individuals with similar experience or qualifications for a minimum of two years.

No new construction is being proposed. Accordingly, there is no possibility that the proposed transaction contemplated herein may have any significant impact on the environment.

VI. Public Interest

Applicants state that approval of this proposed transaction is in the public interest, because after consummation of the transaction applicants will emerge from bankruptcy with a strengthened balance sheet and will continue to operate under their same names and operating authorities as at present. There will be no change in providing service to customers. If XO cannot restructure its balance sheet, XO's financial stability could be significantly compromised and services to California customers would be adversely affected. The proposed transaction should enable XO to continue to provide high quality local, long distance, and

³ Applicants attached current biographies for XO senior management to a November 20, 2002 letter to ALJ Grau.

broadband services to its customer base. We concur with applicants that the proposed transaction is in the public interest, because it permits a financially strengthened XO to continue to provide service.

Applicants seek expedited approval of the proposed transaction. XO has pursued restructuring for almost a year and it is becoming more important for XO to complete its restructuring quickly to avoid any disruption in customer service.

This is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Section 311(g)(2) of the Public Utilities Code, the otherwise applicable 30-day period for public review and comment is being waived.

VII. Motion for a Protective Order

Applicants filed a motion for a protective order for financial exhibits submitted with this application as Exhibit C, because the pro forma statement, balance sheets and income statements contain confidential and proprietary information. Applicants state that public disclosure of this confidential information would subject Applicants to an unfair business advantage. We have granted similar requests for confidential treatment and will issue a protective order.

VIII. Assignment of Proceeding

Geoffrey Brown is the Assigned Commissioner and Janice Grau is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. Resolution ALJ 176-3099 determined that this was a ratesetting proceeding and that no hearings were expected.

2. Notice of this application appeared in the Commission's November 5, 2002 Daily Calendar.

3. No protests were filed.

4. This application has been filed pursuant to Pub. Util. Code § 854.

5. Pub. Util. Code § 854(b) and (c) are not applicable in this instance because none of the applicants has more than \$500 million in gross annual California revenues.

6. XO California and XO Long Distance will continue to operate as XO California and XO Long Distance.

7. No new construction is being proposed.

8. XO California and XO Long Distance are nondominant telecommunications carriers.

9. High River has sufficient financial resources to meet the Commission's requirements to provide facilities-based and resold local exchange and interexchange telecommunications services.

10. High River, through XO's existing management, possesses the necessary technical expertise required by the Commission.

Conclusions of Law

1. The proposed transfer of ownership and control of XO California and XO Long Distance from Craig O. McCaw to Reorganized XO controlled by High River is in the public interest.

2. It can be seen with certainty that the proposed transfer will not have any adverse impact on the environment.

3. It is reasonable to condition approval of the proposed transaction on maintaining the majority of XO's existing senior management or individuals

with similar experience or qualifications for two years from approval of the transaction.

4. With the condition of maintaining the majority of existing XO or comparable senior management, High River meets the Commission's requirements for the issuance of a CPCN to provide facilities-based and resold local exchange and interexchange telecommunications services.

5. Public convenience and necessity require the granting of this application to be effective on the date signed.

O R D E R

IT IS ORDERED that:

1. Applicants XO California, Inc. (XO California) and XO Long Distance Services, Inc. (XO Long Distance) are authorized to indirectly transfer ownership and control through their parent company, XO Communications, Inc., Debtor-in-Possession (XO) from Craig O. McCaw to a newly reorganized XO Communications, Inc., a majority of whose stock will be owned by High River Limited Partnership (High River), subject to the conditions set forth in this decision.

2. XO California and XO Long Distance shall notify the Director of the Commission's Telecommunications Division in writing of the transfer of authority, as authorized herein, within 10 days of the date of consummation of such transfer.

3. The corporate identification numbers U-5553-C and U-6272-C assigned to XO California and XO Long Distance, respectively, shall continue to be used by XO California and XO Long Distance, which shall be included in all original

filings with this Commission and in the titles of other pleadings filed in existing cases.

4. The application is granted as set forth above and the authority granted shall expire if not exercised within one year after the effective date of this order.

5. XO California's and XO Long Distance's motion for a limited protective order to keep Exhibit C under seal is granted. Exhibit C shall remain under seal

and not be accessible or disclosed to persons other than Commission staff for two years from today unless XO California and XO Long Distance make a timely request for extension of confidential treatment by filing a separate motion with good cause shown at least one month prior to the expiration of the confidential treatment.

6. Application 02-10-036 is closed.

This order is effective today.

Dated December 19, 2002, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
CARL W. WOOD
GEOFFREY F. BROWN
MICHAEL R. PEEVEY
Commissioners